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No. 90-1168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS AND
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ALAN H. RICHARDSON
AMERICAN PUBLIC POWER ASSOCIATION
2301 M Street, N.W.
Washington, D.C. 20037
(202) 467-2900

WALLACE F. TILLMAN *
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 857-9500

Counsel for Amici Curiae

* Counsel of Record

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MOTION OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") hereby request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amici curiae* in support of petitioners. *Amici* obtained the consent of the petitioners to the filing of the accompanying brief. Respondent, however, has refused to grant its consent.

The APPA is a national service organization representing more than 1,750 of the nation's nearly 2,000

local publicly-owned electric utilities. Operating in 49 states, APPA members include municipal utilities, state power authorities, public districts, and other public power systems that generate, transmit, and distribute electricity. Members range in size from the Los Angeles Department of Water and Power in California, to smaller communities such as Manassas, Virginia, Easton, Maryland, and Jasper, Texas. While public power systems own, either solely or jointly, over 11% of the nation's installed generating capacity, nearly 500 public systems purchase all of their power requirements from utilities subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), and another 300 to 400 systems rely on FERC-regulated investor-owned utilities for at least part of their electricity.

The NRECA is a national service organization representing 97% of the nation's approximately 1,000 rural electric systems. Member systems provide electricity to approximately 25 million people in 46 states. Approximately 60 rural electric systems generate and transmit bulk power at wholesale to their member-owner distribution cooperatives; another 900 serve solely as distributors, purchasing power from a variety of generation sources and delivering it to their consumer-owners. Collectively, *amici* APPA and NRECA serve nearly 25% of the nation's electricity consumers.

Municipal and rural electric systems have long competed at the retail level with investor-owned utilities. Such "yardstick competition," which helps restrain the pricing behavior of private utilities to the benefit of all electric consumers, has been facilitated in recent years as the industry has grown more reliant on market forces, rather than regulation, to guide allocation and resource development decisions. Many public power and rural electric systems, however, compete at the retail level with the very utilities upon which they depend for power.

Such systems are particularly vulnerable to two types of anticompetitive practices. First, these systems are generally isolated islands surrounded by the service territory of their supplying utility, and can only receive power over that utility's transmission facilities. By refusing to "wheel" (i.e., transmit) power from other sources over these transmission lines, or by agreeing to do so only on unreasonable terms, the utility can prevent its wholesale customer/retail competitor from gaining access to alternative sources.

Preventing a captive customer from reaching alternative sources of bulk power sources creates the opportunity to engage in the second anticompetitive practice—the "price squeeze." This occurs when the wholesale supplier charges its public power or rural electric customer a wholesale rate that approximates, or exceeds, the retail rate the utility charges its own retail customers. This practices makes it impossible for the power-dependent distributor to compete with the supplying utility for retail customers. If prolonged or severe enough, a price squeeze can force the municipal or rural electric system out of the market.

Accordingly, like firms in other competitive markets, public power and rural electric systems that compete with their wholesale suppliers often depend upon the availability of antitrust actions to ensure—or to compel—fair treatment by their suppliers. The decision below, however, eliminates many of the protections that the antitrust laws were intended to afford competitors—and ultimately consumers—and, at the very time when the electric utility industry is growing increasingly competitive, relegates power-dependent municipal and rural electric systems to whatever protections regulation affords. Under the First Circuit's reasoning, utilities subject to federal and state regulation are essentially immune from suit for an anticompetitive price squeeze. Similarly, under the court of appeals' analysis, as long as a utility offers to wheel power in some circumstances, the ex-

tremely limited remedial authority of the FERC over wheeling arrangements prevents the utility from being sued for depriving wholesale purchasing utilities from obtaining access to alternative sources of power. Because the court of appeals' reasoning and holdings implicate the interests of public power and rural electric systems across the nation—particularly, though not exclusively, those that are dependent on utilities for their power and transmission needs—*amici* wish to present their views and to urge the Court to grant the petition for a writ of certiorari filed by the Towns of Concord and Wellesley.

For the foregoing reasons, *amici*'s Motion for Leave to File a Brief in Support of Petitioners should be granted.

Respectfully submitted,

ALAN H. RICHARDSON
AMERICAN PUBLIC POWER ASSOCIATION
2301 M Street, N.W.
Washington, D.C. 20037
(202) 467-2900

WALLACE F. TILLMAN *
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 857-9500

Counsel for Amici Curiae

* Counsel of Record

QUESTIONS PRESENTED

1. Whether public utilities, whose wholesale rates are regulated by a federal agency and whose retail rates are regulated by a state agency, enjoy a judicially created antitrust immunity under Section 2 of the Sherman Act when they impose a "price squeeze" upon their wholesale customers that compete with them in the same retail market.

2. Whether the court of appeals erred as a matter of law in overturning a jury finding of monopoly power in this case even though it was conceded that the defendant possessed monopoly power in both retail sales and transmission of electric power.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	2
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Borough of Lansdale v. *Philadelphia Elec. Co.*, 692 F.2d 307 (3rd Cir. 1982) 13
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 (1976) 2
Cities of Batavia v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982) 4
City of Chanute v. *Kansas Gas & Elec. Co.*, 754 F.2d 310 (10th Cir. 1985) 10
City of Cleveland v. *Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306 (N.D. Ohio 1980) 14
City of Groton v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981) 3, 12, 13, 15
City of Kirkwood v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) 3, 5
City of Mishawaka v. *American Elec. Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1980) 7, 14
City of Mishawaka v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) ..... *passim*
City of Mount Pleasant, Iowa v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988) 14
Florida Power & Light Co. v. *FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983) 10, 11
New York State Elec. & Gas Corp. v. *FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981) 10, 11
Ottertail Power Co. v. *United States*, 410 U.S. 366 (1973) 10
Richmond Power & Light v. *FERC*, 574 F.2d 610 (D.C. Cir. 1978) 10
Tampa Elec. Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 14

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE MATERIALS

	Page
Arkansas Power & Light Co., 8 FERC ¶ 61,131 (1979)	4
Mississippi Power & Light Co., 13 FERC ¶ 63,035 (1980), *vacated*, 20 FERC ¶ 61,406 (1982)	11
Missouri Power & Light Co., 5 FERC ¶ 61,086 (1978)	4
New England Power Co., 43 FERC ¶ 63,013 (1988), *aff'd in part and rev'd in part*, 49 FERC ¶ 61,129 (1989), *aff'd sub nom. Towns of Concord, Wellesley and Norwood, Massachusetts* v. *FERC*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991)	12
Northeast Util. Serv. Co., 53 FERC ¶ 63,020 (1990)	12
Pacific Gas & Elec. Co., 53 FERC ¶ 61,145 (1990)	9, 13
Southeastern Power Admin. v. *Kentucky Util Co.*, 25 FERC ¶ 61,204 (1983)	10
Southern California Edison Co., 40 FERC ¶ 61,371 (1987)	4, 11
Southern California Edison Co., 47 FERC ¶ 61,196 (1989)	11
Utah Power & Light Co., 43 FERC ¶ 63,030, *aff'd in part and rev'd in part*, 45 FERC ¶ 61,095 (1988)	9
Utah Power & Light Co., 45 FERC ¶ 61,095 (1988)	2, 9, 13, 15
Wabash Valley Power Ass'n. v. *Northern Indiana Pub. Serv. Co.*, 23 FERC ¶ 61,179 (1983)	10
Wisconsin Elec. Power Co., 46 FERC ¶ 61,019 (1989), *aff'd*, 918 F.2d 225 (D.C. Cir. 1990)	10

STATUTES

Federal Power Act of 1935, Pub. L. No. 74-333, 49 Stat. 838 (codified as amended at 16 U.S.C. § 791 *et seq.*)	4, 10
16 U.S.C. § 824d	10
16 U.S.C. § 824d(e)	4

TABLE OF AUTHORITIES—Continued

	Page
16 U.S.C. § 824e	10
16 U.S.C. § 824j	10
16 U.S.C. § 824k	10
Sherman Anti-trust Act, ch. 617, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7)	*passim*
15 U.S.C. § 2	2

OTHER AUTHORITIES

P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (1989)	5
J. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 U.C.L.A. L. Rev. 563 (1983)	13
T. Moore, *The Effectiveness of Regulation of Electric Utility Prices*, 36 S. Econ. J. 365 (1970)	5
Brief for Respondent, *Towns of Concord, Norwood, and Wellesley, Massachusetts* v. *FERC*, *aff'd*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991)	10
Brief for the United States as *Amicus Curiae*, *Union Elec. Co.* v. *City of Kirkwood*, No. 81-2278 (U.S. December 1982)	5

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is fully set forth in the Motion for Leave to File a Brief in Support of Petitioners.

ARGUMENT

This Court has long recognized that "the federal antitrust laws are applicable to electric utilities." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 596 n.35 (1976). The decision below, however, carves out two huge exceptions to the courage of these laws by holding, first, that a public utility subject to dual regulation is immune from suit for an anticompetitive price squeeze, and second, that a utility's ostensible willingness to wheel electricity, coupled with the FERC's jurisdiction over wheeling agreements, effectively precludes a court or jury from finding that a utility has unlawfully exercised monopoly power in the bulk power market.

Both of these holdings are predicated on the theory that "regulation significantly diminishes the likelihood of major antitrust harm." Pet. App. 18a. As *amici* demonstrate below, however, this central postulate is flawed in both the rate and transmission regulation contexts. Indeed, the FERC itself, upon whom the First Circuit has placed responsibility for preventing anticompetitive injury, has made clear that it "is not strictly bound by, [nor] empowered to enforce, the antitrust laws." *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,283 (1988). The decision below effectively strips the nation's more than 3,000 municipal electric systems and rural electric cooperatives of protection from much of the most egregious anticompetitive conduct. Because the decision below has significant implications for the electric industry as a whole, and because it conflicts in several respects with the decisions of other circuits, this Court should review, and ultimately reverse, that decision.

1. There can be no doubt that the First Circuit's principal determination, *i.e.*, that a utility subject to dual regulation is immune from liability for price squeeze claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, is in square conflict with the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616

F.2d 976 (7th Cir. 1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096 (1981), and the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In both cases, the courts of appeals considered and rejected the argument, accepted by the First Circuit here, that a utility whose wholesale and retail rates are subject to regulation at the federal and state levels, respectively, should be exempt from liability for anticompetitive price squeezes. *Mishawaka II*, 616 F.2d at 985; *City of Kirkwood*, 671 F.2d at 1177-79; see also *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 934-35 (2d Cir. 1981) ("where . . . there is a discrepancy between [a fully regulated monopolist's] retail and wholesale rates, a rebuttable presumption arises that the differential has an anticompetitive effect"). Indeed, the First Circuit acknowledged that "reported decisions in three circuit courts of appeal . . . suggest that a price squeeze may be unlawful in the regulated electricity industry" (Pet. App. 23a), and that the court's "reasoning and analysis differ[ed] significantly from that in [these] opinions." *Id.* at 24a.

The reasoning and analysis of these other decisions, moreover, highlights the erroneous assumptions underlying the First Circuit's immunity ruling. By mistakenly equating "dual regulation" by two independent regulatory bodies with "full regulation,"[1] the First Circuit assumed that regulation minimizes the competitive harms that otherwise flow from a price squeeze. Dual regulation as

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[1] See Pet. App. 3a ("does Sherman Act § 2 forbid a governmentally regulated firm with *fully regulated* prices—prices that are regulated at both industry levels—from asking regulators to approve prices that could create a price squeeze?") (emphasis in original); *id.* at 23a ("a price squeeze in a *fully* regulated industry such as electricity will not normally constitute 'exclusionary conduct'") (emphasis added); *id.* at 25a ("a price squeeze will not constitute an exclusionary practice in the context of a *fully* regulated monopoly") (emphasis added).

it exists today, however, is neither all encompassing nor, more importantly, completely effective. As a consequence, it cannot and should not supplant the antitrust laws.

To begin with, there are significant "gaps" in the authority of federal and state regulators, both in terms of their ability to police anticompetitive pricing and in their ability to remedy abuses they detect. Thus, for example, in evaluating price squeeze claims, the FERC does not consider the issue of anticompetitive intent essential to a Section 2 violation. *Missouri Power & Light Co.*, 5 FERC ¶ 61,086 at 61,140 n.17, 61,141 (1978). Moreover, in assessing anticompetitive effects, the Commission does not consider the price differential between retail rates and wholesale rates *as filed*. Instead, it examines the difference between retail rates and the wholesale rates the Commission ultimately finds to be just and reasonable. *Arkansas Power & Light Co.*, 8 FERC ¶ 61,131 at 61,510 (1979). Because the Commission can only suspend filed rates for five months (16 U.S.C. § 824d(e)), and because rate adjudication can often take years, the full magnitude of a price squeeze escapes detection under the Commission's standard of review. See *Cities of Batavia* v. *FERC*, 672 F.2d 64, 88-89 (D.C. Cir. 1982).

Compounding the inadequacies of this review are the limitations of regulatory remedies. The FERC can order utilities to refund only the difference between the wholesale rate as filed and that ultimately found to be just and reasonable. *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,168-69 (1987). Such refunds "function to restore to a utility's customers the unlawful overcharges, . . . and do not . . . compensate parties for *actual* harm suffered." *Id.* at 62,169 (emphasis in original); see also *Mishawaka II*, 616 F.2d at 982, 989. Such refunds may "come too late to revive a beleaguered wholesale customer/retail competitor," particularly where the competitor is a small municipal distributor or rural electric cooperative. *Cities of Batavia*, 672 F.2d at 89. The Com-

mission's prospective remedies are equally circumscribed: it can only adjust the wholesale rate within the zone of reasonableness, which may or may not be sufficient to remedy a price squeeze, and it has no authority to order the filing of higher retail rates. See Brief for the United States as *Amicus Curiae* at 12, *Union Elec. Co.* v. *City of Kirkwood*, No. 81-2278 (U.S. December 1982). Because state regulators lack authority to order the filing of lower wholesale rates, the Eighth Circuit correctly concluded that "[only] the antitrust laws can address the entire problem." *City of Kirkwood*, 671 F.2d at 1178.

Perhaps more fundamentally, the First Circuit's dual regulation argument rests on the entirely unexamined assumption that regulatory *authority* corresponds with regulatory *effectiveness*. Practical experience, however, teaches that, even if federal and state regulators possessed the full panoply of investigative and remedial tools, anticompetitive harms would persist.[2] To begin with, the FERC's inability to suspend rates for more than five months, coupled with the often lengthy nature of rate proceedings, permits utilities to circumvent Commission oversight through the simple expedient of subsequent, or "pancaked," filings. See *Mishawaka II*, 616 F.2d at 982. Indeed, in this very case, Edison has successfully manipulated the administrative process such that, since late 1984, it has been able to collect a wholesale rate that the FERC deemed unreasonable in 1988. Pet. at 5 n.1. Moreover, while effective regulation often depends as much on the vigilance of wholesale customers as on the abilities of regulators, such customers lack standing to challenge

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[2] This experience is reflected in a wealth of economic literature. See, *e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 518.3d (1989) ("insensitivities, gaps, or delays in regulation may enable the regulated monopolist to obtain more than competitive returns or improperly to prejudice actual or potential competition"); T. Moore, *The Effectiveness of Regulation of Electric Utility Prices*, 36 S. Econ. J. 365 (1970).

the retail rates of their suppliers in state regulatory proceedings.

Wholly apart from its unwarranted faith in the efficacy of dual regulation, the decision below ignores the distinctive characteristics of public power. The First Circuit's price squeeze analysis is predicated on the assumption that the relevant economic actors are all driven to maximize profits. Thus, the court of appeals asserted that regulation makes it unlikely that a price squeeze will drive independent distributors such as petitioners from the market because such distributors are themselves monopolists capable of recovering revenue sufficient to ensure their solvency. See Pet. App. 19a (noting that the loss of fringe customers or mobile industrial users to Edison would not threaten petitioners with bankruptcy). Municipal and cooperative systems, however, are not profit-maximizers. Controlled by their customers, they cannot respond to a price squeeze by reflexively raising retail prices simply to ensure their continued viability. Indeed, their existence is entirely dependent on meeting or beating their competitors' retail rates. In the case of municipalities, a single vote of the electorate is all that stands between their preservation and demise, and generally the most important issue in any such election is the retail rate differential.

Moreover, the elimination of municipal and cooperative distributors that have forsworn profit-maximization does not yield two of the benefits the court below associated with price squeezes: the elimination of economically inefficient downstream monopoly profits and the reduction of consumer costs. See *id.* at 15a. On the contrary, to the extent a price squeeze forces out a municipal distributor that prices at minimum unit cost, costs to consumers will rise.

In sum, the First Circuit's dual regulation immunity rests on a number of flawed assumptions concerning both the nature of competition between private utilities and their publicly-owned wholesale customers, and the ability

of federal and state regulators to police and correct abuses that grow out of that competition. Indeed, precisely because price squeeze abuses can occur within the dual regulation framework (see *Mishawaka II*, 616 F.2d at 983-84), antitrust price squeeze actions serve as a necessary complement to the efforts of federal and state regulators.

2. Recognizing that the reasoning underlying its sweeping dual regulation immunity "differ[ed] significantly" from that of its sister courts (Pet. App. 24a-25a), the court of appeals sought to justify its decision on an alternative, and presumably narrower, ground—namely, that Edison lacked monopoly power in any relevant market. *Id.* at 25a. That Edison indisputably possesses monopoly power in both retail sales and in transmission of electricity was, in the court of appeals' view, legally insignificant.

Amici agree with petitioners that the First Circuit erred as a matter of law in wresting from the jury any consideration of Edison's monopoly power in the retail and transmission markets. As petitioners point out with respect to Edison's retail monopoly, § 2 of the Sherman Act proscribes unlawful attempts to *maintain*, as well as to acquire, a monopoly, regardless of whether those attempts are successful and regardless of whether they involve the exercise of monopoly power at a second or different level. The First Circuit's decision to the contrary conflicts with the Seventh Circuit's holding in *Mishawaka II* that a showing of monopoly power at either the wholesale or retail level "brings the monopolization provision of Section 2 into operation." *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320, 1325 (N.D. Ind. 1979), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1982).

Petitioners are also correct that the First Circuit erred in concluding that Edison's transmission monopoly is legally irrelevant. That conclusion did not rest simply on a factbound determination concerning the availability of electricity in New England. Instead, as petitioners point

out (Pet. 11, 18-19), the court of appeals announced a sweeping principle that, *as a matter of law*, a utility's ostensible willingness to wheel power, coupled with the FERC's extremely limited remedial authority over wheeling agreements, broadens the relevant market for generation to include all sources that an importing municipality can reach over the facilities of its supplier. See Pet. App. 25a-28a.

The implications of this holding are enormous. Because few transmission monopolists are likely to be generation monopolists under the First Circuit's test,[3] the court's alternative decision will often be as fatal to antitrust price squeeze claims against utilities as its dual regulation ruling. The court of appeals' categorical redefinition of the generation market, moreover, reflects fundamental misconceptions about the transmission market and the FERC's authority to regulate it. As a consequence, it conflicts with numerous decisions recognizing that market definition is a question for the jury, as well as with decisions in the Second and Seventh Circuits which implicitly recognize that the availability of wheeling does not eliminate market power over generation.

Of crucial importance in this case is the fact that Edison was able to foreclose petitioners' access to alternative sources of energy notwithstanding its wheeling agreement. Indeed, it is undisputed that the five-year notice provision in Edison's tariff allowed Edison 1) to continue to charge petitioners as if it were supplying 100% of their power even after the Towns began receiving power from the New York Power Authority, and 2) to assess a $1 million "adverse financial impact" against the Towns for taking 5% of their power from an alternative source. Pet. App. 36a-37a.

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[3] Indeed, in this case, the First Circuit's test led it to conclude that the relevant market for bulk power included all of New England. Pet. App. 26a. According to the court of appeals, Edison possesses only 12% of this market. *Id.*

Rather than examine the access that Edison's tariff actually afforded petitioners, the court of appeals simply asserted that the Towns were free to seek regulatory relief from any unreasonable or anticompetitive features of Edison's wheeling agreement. *Id.* at 28a. The court's invocation of the FERC's remedial powers is the lynchpin to its alternative holding. It is the court's reliance on the FERC's remedial powers that converts what might otherwise have been a fact-specific determination concerning Edison's market power into a sweeping—and erroneous—rule that whenever a utility offers to wheel power—regardless of the terms and conditions of that offer—the relevant generation market includes, at a minimum, all power produced by utilities connected to the transmission monopolist's system.[4] This sweeping principle, in turn, denies municipal and rural electric systems any antitrust inquiry into whether their transmission-monopolist supplier has raised anticompetitive barriers to market entry.

Notwithstanding the First Circuit's assurances, there is, in fact, considerable uncertainty over whether the Commission possesses authority to alter wheeling arrangements. Several courts have held that the Commis-

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[4] The FERC itself recognizes that voluntary wheeling does not, in and of itself, eliminate a transmission monoplist's market power over generation. In determining the market power such a monopolist wields over generation, the Commission conducts a detailed examination of the terms and conditions of the monopolist's wheeling agreement in order to gauge the wholesale customer's *actual* ability to obtain electricity from other sources. See, *e.g.*, *Pacific Gas & Elec. Co.*, 53 FERC ¶ 61,145 at 61,501-04 (1990); *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,290 (1988) (utility's "wheeling policy is not likely to result in meaningful access . . . . [or] prevent [the utility] from unduly preferring [its] own higher-cost generation over competitors' cheaper alternatives"); *Utah Power & Light Co.*, 43 FERC ¶ 63,030 at 65,345-46, *aff'd in part and rev'd in part*, 45 FERC ¶ 61,095 (1988) ("even with the . . . wheeling policy in place, [the utility] will be able to *effectively* deny use of its transmission system") (emphasis added).

sion may not expand a utility's voluntary commitment to wheel power for another utility except as prescribed by §§ 211 and 212 of the Federal Power Act (16 U.S.C. §§ 824j, 824k),[5] and the FERC has concluded that those provisions do *not* permit it to compel or expand wheeling in order to remedy anticompetitive conduct. See *Southeastern Power Admin.* v. *Kentucky Util. Co.*, 25 FERC ¶ 61,204 (1983); see also *City of Chanute* v. *Kansas Gas & Elec. Co.*, 754 F.2d 310, 313 (10th Cir. 1985). *Amici* believe that the Commission has this authority under §§ 205 and 206 of the Federal Power Act (16 U.S.C. §§ 824d, 824e). However, the Commission itself has repeatedly expressed doubts as to the existence of such authority under these provisions[6] and, to the best

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[5] See *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668, 673-76 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *New York State Elec. & Gas Corp.* v. *FERC*, 638 F.2d 388, 400-03 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); see also *Ottertail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973) (holding, before enactment of §§ 211 and 212, that the FERC lacked the authority to compel wheeling); *Richmond Power & Light* v. *FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978) (same).

[6] Counsel for the FERC, for example, recently argued that "the Commission has extremely limited, *if any*, authority under Section 205 of the Federal Power Act . . . to compel . . . an involuntary expansion of a transmission agreement," and that such authority, "*if it exists*, is confined only to those exceptional circumstances where the proponent . . . can demonstrate the need to overcome proven anticompetitive behavior." Brief for Respondent at 20, *Towns of Concord, Norwood, and Wellesley, Massachusetts* v. *FERC*, *aff'd*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991) (emphasis added); See also *Wisconsin Elec. Power Co.*, 46 FERC ¶ 61,019 at 61,113 & n.9 (1989) (although suggesting it has authority, under §§ 205 and 206, to modify contracts to remedy anticompetitive conduct, the Commission stated that ordering transmission "under different terms and conditions than those to which [a utility] has voluntarily agreed . . . . would be inconsistent with the express provisions, statutory history and prior court interpretations of the Federal Power Act"), *aff'd*, 918 F.2d 225 (D.C. Cir. 1990); *Wabash Valley Power Ass'n* v. *Northern Indiana Pub. Serv. Co.*, 23 FERC ¶ 61,179 at 61,390 (1983) ("At present, it is not entirely clear whether we may remedy undue discrimination by ordering wheeling"); *Florida*

of *amici*'s knowledge, has so far declined to exercise such power in the manner the First Circuit suggested it could.[7]

Moreover, even if the Commission possessed such authority, the court of appeals further assumed that the type and cost of non-Edison power, and the type and cost of the non-Edison transmission services available to transport it, make other power ready substitutes for the electricity Edison provides. These assumptions, like those concerning the FERC's remedial authority over wheeling, have little basis in reality. Many municipal and cooperative systems must obtain electricity to meet all of their retail customers' needs. Thus, they must secure both *firm* sources of power and *firm* transmission service to transport that power. See *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,173-74 (1987) (alternative sources of power available only on an "interruptible" basis were not substitutes for transmission monopolist's full-requirements power). Moreover, the cost of such power and transmission services *combined* must be competitive with those of the transmission monopolist.

Power & Light, 660 F.2d at 677 ("authority of the Commission to order wheeling as an antitrust remedy . . . is more questionable" than that of a district court). Indeed, at least one Commissioner has concluded that the agency lacks the authority to order wheeling "for reasons of opening further competition with the providing utility." *Southern California Edison Co.*, 47 FERC ¶ 61,196 at 61,681 (1989) (Trabandt, concurring).

[7] *Amici* are aware of only one situation in which the Commission actually invoked its authority under § 206 to modify a term of a transmission agreement that it found to be anticompetitive, but the Second Circuit concluded on appeal that the Commission had exceeded its authority. *New York State Elec. & Gas Corp.*, 638 F.2d at 400-03. *Amici* have found only one decision since the Second Circuit's ruling in which a transmission agreement was modified pursuant to § 206. That decision, which was made by an administrative law judge, was ultimately vacated by the full Commission. *Mississippi Power & Light Co.*, 13 FERC ¶ 63,035 (1980), *vacated*, 20 FERC ¶ 61,406 (1982).

Glossing over these marketplace realities, the court of appeals asserted that power generated throughout New England was available to petitioners because NEPOOL power flowed "freely" among members. That fact, however, says nothing about the types of power or transmission services that petitioners can purchase. As an administrative law judge recently observed, "ad hoc" transmission service negotiations in the New England electricity market have for some time "posed serious difficulties for transmission customers." *Northeast Util. Serv. Co.*, 53 FERC ¶ 63,020 at 65,219 (1990). Even when some form of transmission is obtained, moreover, purchasers are often not guaranteed *firm* service. Thus, for example, "[n]othing in the NEPOOL agreement requires its members to surrender their native load preference [*i.e.*, a preference whereby a wheeling utility favors its own customers over those of a transmission purchaser when capacity constraints arise], and none do." *Id.* at 65,222; see also *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 933 (2d Cir. 1981) (NEPOOL agreement has no provision for wheeling firm power). Indeed, for years petitioners have engaged in an unsuccessful attempt to force the New England Power Company ("NEPCO") to provide firm transmission service to carry the firm power that the towns purchase from the New York Power Authority. See *New England Power Co.*, 43 FERC ¶ 63,013 (1988), *aff'd in part and rev'd in part*, 49 FERC ¶ 61,129 (1989), *appealed sub nom. Towns of Concord, Wellesley and Norwood, Massachusetts* v. *FERC*, No. 90-1179, slip op. (D.C. Cir. Feb. 11, 1991).

Those efforts highlight at least two of the difficulties that importing distribution systems face. First, in order to ensure an adequate and reliable supply, such systems must pay for *firm power* even though the "firmness" of the service they ultimately receive may be diminished by a wheeling utility's refusal to provide *firm transmission*. Second, municipal and cooperative systems

must often negotiate with a number of utilities (in the NEPCO case, one producer and two wheeling utilities, NEPCO and Edison), each of whom can add to the cost and complexity of obtaining alternate sources of power. See *Utah Power & Light*, 45 FERC at 61,285 n.125 (noting that certain out-of-state power was not an "economically feasible alternative[] [to that of a transmission monopolist] . . . since . . . wheeling charges would have to be paid to at least three other utilities"). Finally, physical constraints often limit the availability of alternative power. Thus, the FERC has recognized that limitations in transmission capacity and line losses may effectively render distant power unavailable. See *id.* Similarly, the transmission rights necessary to import low-cost power may already be fully utilized. See *Pacific Gas & Elec.*, 53 FERC at 61,502.

For all of these reasons, "defining a geographic market for generation [must] be an empirical task tailored to the utility at issue." J. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 U.C.L.A. L. Rev. 563, 611 (1983). The First Circuit, however, has forsaken this empirical inquiry in favor of a categorical rule that a utility's apparent willingness to wheel, coupled with the FERC's remedial jurisdiction, expands the relevant market to include all sources of power connected to the utility's transmission grid. This categorical approach conflicts with numerous decisions recognizing that the definition of the relevant market in cases involving electric utilities "is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry." *Borough of Lansdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3rd Cir. 1982).[8]

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[8] See also *City of Groton*, 662 F.2d at 930 (while "[i]t is inherently difficult to define competition in the electric-power industry" . . . "the essential characteristic of competition . . . [is] that there are or could be alternate suppliers of the same product in the same geographic area") (quotation marks and internal cita-

This approach also implicitly conflicts with decisions in the Second and Seventh Circuits recognizing that the willingness to wheel power, either alone or in conjunction with whatever remedial powers the FERC may possess, does not necessarily broaden the bulk power market to include producers other than the transmission monopolist. Thus, in *Mishawaka II* the Seventh Circuit noted that the transmission monopolist had "advised [its captive municipal wholesale customers] to seek alternative sources of wholesale electricity which [it] offered to 'wheel.'" 616 F.2d at 980. The Seventh Circuit nevertheless affirmed the district court's finding of an anticompetitive price squeeze, observing that "[t]here was no *realistic* substitute source of wholesale power for the municipalities to turn to." *Id.* at 985 (emphasis added). Similarly, in *City of Groton*, the Second Circuit concluded that a captive municipality had stated a valid price squeeze claim notwithstanding the fact that the

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tions omitted); *City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306 (N.D. Ohio 1980) (considering actual competitive forces in defining relevant market); *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979) (same), *aff'd in relevant part*, 616 F.2d 976 (7th Cir. 1982); *cf. Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (in Clayton Act case, "the area of effective competition . . . must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can *practicably* turn for supplies") (emphasis added).

Nor is the decision below consistent with *City of Mount Pleasant, Iowa* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988), which the First Circuit cited in support of its alternative holding. See Pet. App. 27a. In rejecting a claim that a wholesale supplier's anticompetitive wheeling practices gave it monopoly power in the wholesale market, the Eighth Circuit nowhere relied on the customer's ability to challenge improper wheeling practices before the FERC. Rather, the court simply held that the customer had failed to offer evidence that the supplier's practices were unreasonable or anticompetitive. 838 F.2d at 280. Implicit in that holding is the suggestion that, had the customer proffered such evidence, it could have stated a price squeeze claim. Here, of course, petitioners offered precisely such evidence.

utility had "repeatedly announced its willingness to wheel and [had] entered into numerous wheeling contracts." 662 F.2d at 933; *id.* at 934. The First Circuit's contrary approach cannot be squared with these decisions, or with the numerous decisions holding that market definition is a question to be resolved by the factfinder based on the unique circumstances of each case.

3. Even if the Court disagrees with *amici* that the First Circuit's sweeping approach to market definition is worthy of independent review, the court of appeals' alternative holding should not stand as an obstacle to this Court's resolution of the circuit conflict created by the court of appeals' dual regulation immunity holding. In essence, the court of appeals' alternative holding is merely an extension of the principle—central to the dual regulation immunity holding itself—that "regulation makes a critical difference in terms of antitrust harms" and that "regulatory rules, constraints, and practices" effectively prevent a transmission monopolist such as Edison from engaging in predatory conduct. Pet. App. 12a.

Like its misplaced faith in the ability of regulation to prevent a price squeeze, the First Circuit's assumption that regulation can eliminate market power is fundamentally flawed. As *amici* have shown, the Commission has yet to claim the authority to modify wheeling agreements that are anticompetitive.[9] See *supra* at 9-11 & nn. 5-7. Moreover, even if the Commission were to assert such authority, it would often prove an inadequate remedy, both

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[9] Ironically, the Commission recently explained its reluctance to compel wheeling under its §§ 205 and 206 powers by pointing to the fact that "there exist[s] a remedy at law, without resort to the [Federal Power Act], through which aggrieved parties [can] seek relief." *Utah Power & Light*, 45 FERC at 61,282 n.98. As a result of the decision below, wholesale customers in the First Circuit now face the prospect of being whipsawed between a federal agency and the federal courts in a vain effort to obtain a remedy for anticompetitive wheeling practices.

because of the time and expense associated with the Commission's complaint process, and because of circumstances in the generation and transmission markets that are simply beyond the Commission's control. See *supra* at 12-13.

In short, just as the First Circuit's dual regulation immunity rested on an erroneous view of the role and limitations of federal and state regulatory control over electric rates, so too its determination that Edison lacked market power over generation rested on a mistaken conception of the FERC's ability to remedy anticompetitive conduct by transmission monopolists. Because it shares the same infirmities, the alternative holding cannot shield the dual regulation immunity holding from review. Accordingly, *amici* submit that the Court should review the First Circuit's alternative holding in conjunction with any consideration of the dual regulation immunity, for reversal of the latter necessarily would require vacation of the former as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN H. RICHARDSON
AMERICAN PUBLIC POWER ASSOCIATION
2301 M Street, N.W.
Washington, D.C. 20037
(202) 467-2900

WALLACE F. TILLMAN *
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 857-9500

Counsel for Amici Curiae

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* Counsel of Record